MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-173

JACKSONVILLE TERMINAL COMPANY,
A CORPORATION,

Petitioner,

—v.—

IRIS HODGE, AS ADMINISTRATRIX OF THE
ESTATE OF JAMES L. HODGE, DECEASED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OF THE STATE OF FLORIDA

REPLY BRIEF FOR PETITIONER

ADAM G. ADAMS, II
1116 Barnett Bank Building
Jacksonville, Florida 32202

DENNIS G. LYONS
DAVID BONDERMAN
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Attorneys for Petitioner

Of Counsel:

ADAMS & ADAMS
Jacksonville, Florida

ARNOLD & PORTER
Washington, D. C.

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1. The respondent suggests (Br. Op., pp. 12-14) that this Court is without jurisdiction to consider the petition for certiorari because the judgment of the District Court of Appeal was, she claims, not the decision of the "highest court of a State in which a decision could be had" as to the question presented in this case. The respondent suggests that the Florida Supreme Court had a "discretionary" power of review over the question presented here. (Br. Op., p. 13) The suggestion is not well taken.

The jurisdiction of the Florida Supreme Court may be "discretionary" as contended for by respondent, but that discretion, as respondent admits elsewhere (Br. Op., p. 12), only extends to cases where there is a "direct conflict" be-

tween decisions of District Courts of Appeal or between the decision of one District Court of Appeal and the Florida Supreme Court. The only general discretionary review power which the Florida Supreme Court has is the power to review cases "of great public interest"; but that power exists only where the question is first certified as such "by the District Court of Appeal." Fla. Const., Art. 5, §4(2), Pet. 29a. Here the Terminal Company requested the District Court of Appeal to make such a certification to obtain an opportunity for Supreme Court review but the District Court of Appeal refused.

Faced with this, respondent makes two tenuous suggestions as to a "direct conflict." (Br. Op., p. 13 n.10) The first theory of a direct conflict is that the decision of the court below conflicted with the well-established law in Florida under *Osborne* v. *Van Horn,* 2 Fla. Rep. 360 (1848), to the effect that a widow may "resort to the awards to the children in order to support them." (Br. Op., p. 13 n.10(a)) But this hardly conflicts with the opinion below which in pertinent part was to the effect that: "In an action by an administrator under FELA the estate must maintain the action for the use and benefit of the widow and the minor children." (Pet., Appendix A, p. 5a) It is hard to see where there is a conflict between the two provisions. The error made by the court below did not consist of any failure to follow *Osborne* v. *Van Horn,* but its failure to appreciate the fact that as a matter of federal law the conclusion it had reached that there was a difference in parties between Mrs. Hodge's two law suits was a conclusion based on form rather than substance. And under *Schendel,* the issue "must be determined as a matter of substance and not of mere form." *Chicago R.I. & Pac. R. Co.* v. *Schendel,* 270 U.S. 611, 618 (1926).

The other basis for an alleged "direct conflict" between the Florida District Courts of Appeal has to do with an issue relating to assumption of risk which the petitioner has abandoned. (Br. Op., p. 13 n.10(b)) Surely it cannot be the law that in order to present to this Court a petition for certiorari on the basic issue tendered by the present petition, petitioner was required first to tender to the Florida Supreme Court a petition for certiorari based on an entirely different issue.

Certainly there is no reason with respect to the certiorari jurisdiction of this Court to require petitioners seeking review of Florida state court judgments here to tender to the Florida Supreme Court petitions for certiorari in every case, in view of the fact that the Florida Supreme Court's discretionary certiorari jurisdiction (unlike this Court's) is so strictly limited by that State's constitution. Yet respondent comes close to making the suggestion that in every case this should be done. (Br. Op., p. 13) This Court recently addressed the specific problems caused by the limited jurisdiction of the Florida Supreme Court in *Nash* v. *Florida Industrial Comm'n,* 389 U.S. 235, 237 (1967). The Court there phrased the test as only whether it was "impossible for us to say that under Florida law petitioner . . . had any right to call upon the State Supreme Court for review." Where this Court was "unable to say that the District Court of Appeal was not the highest court in Florida wherein a decision could be had" (*Ibid.*), it upheld its own jurisdiction to review the case on certiorari, notwithstanding the failure of the petitioner there to apply for certiorari to the Florida Supreme Court. Clearly, in the absence of any "direct conflict" between Florida circuits on the point now tendered to this Court, that test is met here.

2. As to the substantive issues, there are two points emphasized in the Brief in Opposition to which petitioner believes a short reply is appropriate. As to the other points, we stand on the positions taken in the petition.[1]

(a) Identity of Parties. Both the lawsuits involved in the present litigation were brought by Mrs. Hodge. The first—state wrongful death—action was brought by Mrs. Hodge individually, seeking benefits which would have accrued to her personally and to her children, including as an item of damages sought the loss of support of her husband for the children. The second—FELA—action was brought by Mrs. Hodge in her capacity of administratrix of her husband's estate, the beneficiaries of which were herself and the children. Mrs. Hodge contends that the parties to the first and second lawsuits are not the same and that the Florida District Court of Appeal so determined as a matter of Florida law by which this Court is bound. (Br. Op., p. 18)

This case involves, of course, a determination of the right to invoke Federal legislation, the FELA. As such, it is the subject of Federal, not state, rules of decision. *Hogue* v. *Southern R. Co.*, 390 U.S. 516 (1968); *Maynard* v. *Durham*

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[1] One further point does require a brief comment. Mrs. Hodge suggests that there are certain procedural differences between a Florida common law negligence action and an FELA action which makes the state law action less favorable to the plaintiff than the FELA. (Br. Op., pp. 3-6) As demonstrated in our petition, pp. 10-11, this is not so. For example, Mrs. Hodge complains that under Florida negligence law, the railroad's negligence must be the proximate cause of the accident. (Br. Op., p. 5) But Mrs. Hodge fails to note that the same requirements exist under the FELA. See *Atlantic Coast Line R. Co.* v. *Gentry*, 46 So.2d 485 (Fla.), cert. denied, 340 U.S. 853 (1950). To the same end, Mrs. Hodge maintains that under Florida law "negative" testimony cannot be used to overcome "positive testimony." This simply reflects a misunderstanding of Florida law. See *Roberts* v. *Powell*, 137 Fla. 159, 185 So. 766 (1939). See also the language of the court below at pages 10a-13a in the petition.

& S. R. Co., 365 U.S. 160 (1961); *Jesionowski* v. *Boston & M. R. Co.*, 329 U.S. 457 (1947). In fact, the Florida District Court of Appeal, while stating that under Florida law the parties to the two suits were not the same, evidently thought that it was also following federal law in basing its holding upon *Troxell* v. *Delaware, L. & W.R. Co.*, 227 U.S. 434 (1913):

> The Federal Supreme Court [in *Troxell*] held that a judgment by a widow in her individual capacity which was prosecuted and tried on the theory that it involved a cause of action under state law, is not a bar to a subsequent action by the widow as administratrix brought under FELA. (Pet., Appendix A, pp. 4a-5a)

But as we have pointed out (Pet., pp. 8-13), in this respect *Troxell* has long since been repudiated. *Chicago, R.I. & Pac. R. Co.* v. *Schendel*, 270 U.S. 611 (1926). It is now clear, as a matter of Federal law, that a widow suing in her own behalf is, for the purposes of the FELA, the same person as a widow suing as administratrix of her deceased husband's estate. *Chicago, R.I. & Pac. R. Co.* v. *Schendel, supra; see also Landreth* v. *Wabash R. Co.*, 153 F.2d 98 (7th Cir. 1946).

This result is in no way changed by the formal addition of the children—upon whose behalf recovery was sought in the first action and who would have been the beneficiaries of a portion of any such recovery[2]—as parties

[2] Mrs. Hodge now suggests that the children were not beneficiaries of the first action and that the Florida District Court of Appeal so held. (Br. Op. pp. 13, 19) In fact, the District Court of Appeal held only that due to the differences in form under Florida law the parties to the two suits were different. (Pet., Appendix A, p. 5a) Neither Mrs. Hodge nor the District Court of Appeal quarreled with the long established Florida rule that had she prevailed in the first action, Mrs. Hodge would have recovered for loss of support for the children or that she would have been obligated to use that portion of the award for the support of the children. *Director Gen.*

[footnote continued on next page]

specifically allocated a portion of the judgment in the second suit. As this Court has noted, the identity of parties in FELA claims must be determined as "a matter of substance and not of mere form." *Chicago, R.I. & Pac. R. Co.* v. *Schendel, supra,* at 618. Both suits sought the recovery of the same damages for the same losses sustained by the widow and children. In both suits the beneficiaries were the same, even if Mrs. Hodge's title on the complaint was not. And in both suits the major share of the award sought was for Mrs. Hodge—indeed, having had her day in court when the first jury determined that she was not entitled to recover, she then was awarded $133,000 by the second jury.

There can be little doubt, then, as a matter of substance, that the parties to the two suits were identical and that the Florida District Court, in failing to apply the required federal standards set forth in *Schendel,* erred in concluding otherwise.

(b) Res judicata and collateral estoppel. Both the lawsuits involved in the present litigation concern the Terminal Company's liability to Mrs. Hodge for the accident which caused her husband's death. Mrs. Hodge's first suit was brought on the theory, unchallenged during the trial, that he was not in the course of his employment. When the first jury exonerated the railroad of liability, Mrs. Hodge pursued full appeals but never raised any question as to Hodge's employment status. Mrs. Hodge then brought the second suit, alleging that Hodge had been in the course of

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of Railroads v. *Into,* 83 Fla. 377, 91 So.2d 269 (1922); *Slaughter* v. *Cook,* 195 So.2d 6 (Fla. App. 1967); 24 Fla. Jur. 155, § 10. Nor, with respect to the FELA action's separate award to the children, is there any dispute that Mrs. Hodge may use its corpus for the children's support. *Osborne* v. *Van Horn,* 2 Fla. Rep. 360 (1848).

his employment at the time of this death, and seeking to relitigate the issues resolved against her in the first suit. While relitigation of these issues would normally be precluded by the doctrines of res judicata and collateral estoppel, Mrs. Hodge claims that because in the trial the court found Hodge had been in the course of his employment, the court which tried the first suit (the same court!) was without "jurisdiction" over the subject matter and hence neither res judicata nor collateral estoppel could apply. (Br. Op., pp. 21-23)[3]

It is obviously erroneous to analyze the matter in this fashion. To say that the Florida Circuit Court for Duval County lacked jurisdiction over Mrs. Hodge's suit for the death of her husband is patently absurd. For it is the Circuit Court for Duval County which rendered the second judgment, under the FELA, in Mrs. Hodge's favor, the judgment which she now seeks to uphold. The question clearly is not one of subject-matter jurisdiction—the Circuit Court clearly had it whether or not Hodge was in the course of his employment—but simply of the basis of relief available to Mrs. Hodge.

The cases cited by respondent (Br. Op., p. 22) are not in point. Respondent relies on several workmen's compensation cases in which the ruling of a state or Federal administrative agency was held not to be res judicata against a

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[3] Mrs. Hodge also claims, based upon fine distinctions not reflected in the case law, that the Terminal Company failed to preserve certain portions of its res judicata—collateral estoppel arguments. (Br. Op., pp. 9-10) This Court has recognized the close interrelationship of res judicata and collateral estoppel, *Ashe* v. *Swenson*, 397 U.S. 436 (1970); the Terminal Company contended at every stage of the proceedings below that it could not be sued a second time by Mrs. Hodge in her FELA action; and these arguments made by Terminal Company at all stages of this case are more than enough to preserve the res judicata—collateral estoppel point.

later FELA (or Jones Act) suit.[4] The administrative agencies obviously have no jurisdiction to award relief under the FELA. By contrast, the Circuit Court for Duval County had jurisdiction, whether Mr. Hodge was in the course of his employment or not, to award Mrs. Hodge a judgment for money damages for his death if she deserved one, either under the state Wrongful Death Act or the FELA.

Moreover, even if the question is viewed as one of "subject matter jurisdiction," as respondent claims, it is at most a question as to a "jurisdictional fact"—Hodge's status as in his employment or not at the time of the accident. It is well settled that a court has jurisdiction to determine its own jurisdiction, and that while such a determination is subject to review through the appellate process, it is not subject to collateral attack. *Durfee* v. *Duke*, 375 U.S. 106 (1963); *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940); *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938); *Dowell* v. *Applegate*, 152 U.S. 327 (1894); *Des Moines Nav. & R. Co.* v. *Iowa Homestead Co.*, 123 U.S. 552 (1887); *Skillern's Executors* v. *May's Executors*, 10 U.S. (6 Cranch) 153 (1810).

This is no less so because, rather than litigating the point, all parties to the first case assumed that jurisdiction was proper. For example, in *Skillern's Executors* v. *May's*

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[4] Not only do these cases involve the authority of administrative agencies rather than courts, but in most of the cases no final decision was ever made in the first suit. Thus, for example, in *Waters* v. *Guile*, 234 Fed. 532 (6th Cir. 1916), the parties had abandoned pursuit of the workmen's compensation scheme when they could not reach the agreement required by state law. And in *Boatel, Inc.* v. *Delamore*, 379 F.2d 850 (5th Cir. 1967), the Federal agency involved was held to be without jurisdiction on direct appeal. Interestingly, in *Boatel* all parties—including the court—appear to have assumed that if the issue were whether acts were or were not in the course of employment, collateral attack would be impossible. *Id.*, at 854.

Executors, supra, the plaintiff had failed to allege facts sufficient to demonstrate federal jurisdiction. Nonetheless, both parties litigated the case on the merits, and the case was carried on appeal to this Court without the jurisdictional issue being raised. After this Court's judgment became final, but before the lower court had carried out this Court's orders, the defendants sought to set aside the judgment for lack of jurisdiction. This Court held that jurisdiction was not subject to collateral attack where direct review had been open to the parties. 10 U.S., at 154.

Similarly, in *Chicot County Drainage Dist.* v. *Baxter State Bank, supra,* neither party had objected to the jurisdiction of the Federal Court in the first case. After this Court indicated in another suit that the federal court lacked jurisdiction over the type of dispute involved, one of the parties attempted to collaterally attack the judgment. This Court refused to allow such collateral attack:

> The court has authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is *res judicata* in a collateral action . . . . There can be no doubt that if the [jurisdictional] question . . . had actually been raised and decided by the District Court in the proceeding . . . that determination would have been final save as it was open to direct review on appeal. [Citation omitted.]
>
> The remaining question is simply whether respondents, having failed to raise the jurisdictional question in a proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented

> . . . but as to any matter which might have been presented . . . . (308 U.S., at 377-78)

This language is particularly applicable to Mrs. Hodge since she commenced the second suit, which in fact impugned the "jurisdictional facts" on which her first suit was based, while the first suit was still on appeal—of course not advising the appellate court of what she had done (Pet., p. 5).

In the present case, where Mrs. Hodge could have litigated the "jurisdictional" issue—or, put more practically, the factual issue of employment—in the first case—and could either have joined her two theories of action, state-law and FELA, in one suit or in two concurrent suits consolidated in the state court—but chose not to, she is by traditional principles of res judicata and collateral estoppel precluded from collaterally attacking the result of the first case.

CONCLUSION

For the reasons stated herein and in the petition for certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ADAM G. ADAMS, II
1116 Barnett Bank Building
Jacksonville, Florida 32202

DENNIS G. LYONS
DAVID BONDERMAN
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Attorneys for Petitioner

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